IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / ~~NO.~~
(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO.~~
(3) REVISED.
03/08/2018
DATE SIGNATURE

CASE NO: 86233/2017
DATE:

IN THE MATTER BETWEEN:

KEITH WARREN KEATING	**First Applicant**
FORENSIC DATA ANALYSTS (PTY) LTD	**Second Applicant**
DURAND SNYMAN	**Third Applicant**
MOTOXPRESS MENLYN (PTY) LTD	**Fourth Applicant**
CHRISTO DE BRUIN	**Fifth Applicant**
and	
SENIOR MAGISTRATE I.P. DU PREEZ N.O.	**First Respondent**
THE MINISTER OF SAFETY AND SECURITY	**Second Respondent**
COLONEL KOBUS DEMEYER ROELOFSE	**Third Respondent**
COLONEL J. DU PLOOY	**Fourth Respondent**

EXECUTIVE DIRECTOR: INDEPENDENT POLICE INVESTIGATIVE DIRECTORATE N.O.

Fifth Respondent

JUDGMENT

KOLLAPEN J:

1. This application relates to the authorisation of a search and seize warrant issued by the first Respondent on the 1st of December 2017 as well as the circumstances relating to the execution of that warrant on the 4th of December 2017.

2. It is common cause that on the 1st of December 2017 the first Respondent authorised a Search and Seizure Warrant in favour of the third Respondent on behalf of the Independent Police Investigative Directorate ("IPID") and the Directorate for Priority Crime Investigation ("DPCI"). That warrant was executed on the 4th of December 2017 at various places mentioned in the warrant and documents and articles were seized.

3. It is both the warrant and the seizure that the Applicants attack in these proceedings, which the third to the fifth Respondents oppose.

Litigation history

4. The matter commenced as an urgent application and was enrolled for the 2nd of January 2018. The parties were able to resolve some of the issues that rendered the matter urgent and on the 10th of January 2018 this Court made an order that

regulated the timeline for the exchange of further affidavits, and also provided for the return of some of the items seized, provided the investigation in respect of those items were completed, and for the making and furnishing to the Applicants of hard copies of all documents seized from them.

The background facts

5. On the 1st of December 2017, the first Respondent authorised a search and seizure warrant in terms of Section 21 read with Section 20 and Chapter 2 of the Criminal Procedure Act 51 of 1977 ("the Act"). The warrant identifies the offences that have been /are being/are intended to be committed, as follows:

> *"Fraud and/or Theft and Corruption, as well as racketeering and money laundering contraventions, as set out in the Prevention of Organized Crime Act, suspected to have been committed during the period, January 2014 to date by one Durand Snyman and others during his directorship/ownership of Prima Inspectacar Wonderboom (Pty) Ltd with registration number 2005/009567/07, Prima Inspectar trading as Hyundai Mokopane (Pty) Ltd with registration number 1999/015215/07 and Ronat Nissan Mosselbay (Pty) Ltd with registration number 2001/028018/07 by supplying vehicles free of charge to police officials and/or inflating trade-in prices on private vehicles of said police official/s involved in the SAPS's procurement processes*
> *And/or*
> *Fraud and/or Theft and Corruption, as well as racketeering and money laundering contraventions, as set out in the Prevention of Organized Crime Act, suspected to have been committed during the period, January 2014 to date by one Keith Keating and others during his directorship/ownership of Forensic Data Analyst (Pty) Ltd with registration number 1999/023867/07 by supplying vehicles free of charge to police officials involved in the SAPS's procurement processes.*

And/or

Fraud and/or theft and Corruption, as well as racketeering and money laundering contraventions, as set out in the Prevention of Organized Crime Act, suspected to have been committed during the period, January 2010 to date by one John Henry Deale, Jolanta Regina Komodolowicz during their directorship/ownership of Crimetech (Pty) Ltd with registration number 2012/068069/07 and Kriminalistik (Pty) Ltd with registration number 2009/027418/07 by supplying financial incentives to police official/s involved in the SAPS's procurement processes."

6. The warrant provides the following details in respect of the premises and persons that are subject to it:

"Such articles –

i) Are upon or at the following premises within my area of jurisdiction, namely

- *Desire Smith: 15 Simone Place, Moreleta Park, Pretoria*
- *Durand Snyman: 6 Jamaican Music Avenue, Mooikloof and*
- *Motor Express, 109 Atterburry Road, Pretoria*
- *Keith Keating: 10 Politician Road, Mooikloof, Pretoria*
- *Forensic Data Analyst (Pty) Ltd with registration number 1999/023867/07, Stonehill Office Park, Horizon Building, corner of Hans Strijdom and Disselboom Street, Wapadrand*
- *JK Phahlane: 10 Mongoose Avenue, Sable Hills Waterfront Estate, Kameeldrif, Pretoria*
- *BN Phahlane: 10 Mongoose Avenue, Sable Hills Waterfront Estate, Kameeldrif, Pretoria*
- *C de Bruin: 10 Naval Escort Street, Mooikloof, Pretoria*

(such being hereafter referred to as, "the premises"); and/or

ii) Otherwise are under the control of or upon the following person(s) who currently reside(s)/work(s) within my area of jurisdiction

- *Durand Snyman with identity number 7006295311088*
- *Desire Smith with identity number 8705180054088*
- *Keith Keating with identity number 6608095070086*
- *JK Phahlane with identity number 6705295314080*
- *BN Phahlane with identity number 6701230480086*
- *JJ Potgieter with identity number 6708025175086*
- *C de Bruin with identity number 9602120102086*

(such being hereinafter referred to as "the identified person(s)]."

7. The warrant also has the details of IPID and DPCI officials who are authorised to take part in the search and seizure as well as three individuals who are not part of the IPID or DPCI and they are dealt with as follows:

"*In addition to the above mentioned officials the following individuals will also take part in the search and seizure in the following capacity as Annexure A:*

- *Independent professional valuator Mr. AL van Graan with identity number 4505285008086 from Lock Stock and Barrel Valuers to 10 Mongoose Avenue, Sable Hills Waterfront Estate, Kameeldrif, Pretoria to establish the actual value during the search and seizure*

- *Mr CR Oellerman with identity number 7212115049086 and Mr CC Wissing with identity number 7204065094089 from Bowman Gilfillan to Forensic Data Analyst (Pty) Ltd, Stonehill Office Park, Horizon Building, corner of Hans Strijdom and Disselboom Street, Wapadrand. They will only be present in an advisory*

capacity in order to assist in identifying the specific documentation as mentioned in annexure B."

8. The warrant then has attached to it as Annexure A the list of members who will execute the search and seizure warrant with the names of Messrs Oellerman, Wissing and van Graan clearly identified thereon as being authorised to be present in an advisory capacity only.

9. Annexure B to the Warrant deals with the documentation that is sought to be searched for and seized and relates to documents relevant to the acquisition of vehicles, the affairs of various individuals and entities who are named or referred to in the warrant as well as details of some 21 motor vehicles in respect of which the warrant would also apply.

10. Finally it also provides for the search and seizure of documentation that relates to various individuals and entities in respect of *inter alia* company documents, banking and financial details and records, tenders received, and the personal financial records relating to various individuals mentioned in the warrant.

11. The Warrant was issued on the basis of an affidavit deposed to by the third Respondent, Colonel Kobus Demeyer Roelofse ("Colonel Roelofse"), who describes himself as a colonel in the SAPS stationed at Directorate Priority Crime Investigations. While the matter of whether the document that I have referred to constitutes an affidavit or not, has been placed in dispute, for now I will deal with its contents.

12. Colonel Roelofse states that the warrant is required as its execution is likely to give material and relevant information relating to the alleged offences of fraud and/or theft and/or corruption and/or Racketeering and/or Money Laundering. He then makes reference to an investigation involving the former Acting National Commissioner, Lieutenant General Johannes Khomotso Phahlane on the one hand, and John Deale and Jolanta Komodolowicz (both as directors of Crimetech) in what is described as an alleged corrupt relationship and alleging the receipt of cash that Lt Gen. Phahlane would have received from Crimetech to fund the financing of his private dwelling.

13. He states further that the investigation led to the discovery of numerous vehicles in the name of Lt Gen. Phahlane and his wife in respect of which no financing agreements could be found and then provides details of various vehicles that Lt Gen. Phahlane either would have traded in at a loss to the dealership as well as vehicles that Lt Gen. Phalane would have received from the dealership known as Prima InspectaCar. He also alluded to 2 vehicles delivered to one Colonel Potgieter (involved at the time in procurement in the SAPS forensic division) and C de Bruin (daughter of a friend of Mr Snyman). Mr Snyman was described as the former owner of Prima InspectaCar. Mr Snyman is the third Applicant in these proceedings.

14. It was alleged by Col. Roelofse and relying in part on bank records, that the first Applicant made various payments to Mr Snyman into his Namibian bank account that correspond in part to the value of the vehicles that Prima Inspectacar would have delivered to Lt Gen. Phahlane, Col. Potgieter and de

Bruin and that Mr Snyman then effected payments out of this account to other entities.

15. Col Roelofse suggests that what the investigation and the documentation revealed was an arrangement in terms of which Mr Snyman (now director of the fourth Applicant) would provide vehicles to Lt Gen. Phahlane and others who were involved or connected with those involved in the SAPS procurement process and that the first Applicant, who is also a director of the second Applicant, would be responsible for the payment for such vehicles.

16. Finally the affidavit of Col Rolefose provides some detail with regard to the investigation into the alleged irregular awarding of tenders by SAPS Forensics Division (of which Lt Gen. Phahlane was the Divisional Commissioner at the time) to the second Applicant. Col Roelofse by way of example, provides an instance where he alleges that a quotation provided by the second Applicant for over R45 million was considered, recommended and approved on the same day. A further amount of some R 7 million was added, and the sum of about R52 million was paid to the second Applicant. He states that the additional amount was not included in the quote but also that the contract was not advertised and that proper bidding processes were not followed.

17. Finally he contends that the first Applicant made corrupt payments to the Phahlanes and Col Potgieter using the conduit of Mr Snyman (via vehicle dealerships) to influence the tender process and ensure tenders were awarded to the second Applicant.

The execution of the warrant

18. Following its issue on the 1st of December 2017 the Warrant was executed at many of the addresses to which reference is made in the warrant and various articles were seized purportedly in terms of the warrant. It is also common cause that a Mr de Villiers of the firm Bowman Gilfillan was present during part of the search and seizure operation and that the warrant does not make reference to him being authorised to be there in an advisory capacity. This is a matter I will return to later in this judgment.

The challenge of the Applicants

19. In seeking the relief they seek the Applicants contend that:

a) **The document that purports to be an affidavit by Col Roelofse is not an affidavit:**

The Applicants contend that the document that purports to be Col Roelofse's affidavit is not an affidavit as it does not appear that it was properly commissioned in that:

i) There is no proper identification of the Commissioner of Oaths including his/her designation and whether the office is held *ex officio* or whether the person was appointed specifically as Commissioner of Oaths;

ii) That from the certificate it appears that the person who appeared before the Commissioner of Oaths was a woman while Col Roelofse is a male;

iii) There is no reference to the prescribed oath being taken.

20. When one has regard to the "attestation" then the following emerges: The questions that customarily precede the signature of the document that relate to understanding the contents of the statement, the absence of objections to taking the oath, the oath as being binding on the deponent's conscience and the swearing that the contents of the statement are true, all appear clearly and without ambiguity from the attestation section. There is therefore little merit in this part of the complaint.

21. The reference to "she" must clearly have been an error as it is common cause that Col Roelofse is a male. The Commissioner of Oaths, Mr Mabasa, says as much in the Answering Affidavit filed on behalf of the third to the fifth Respondents. He also deals with his lack of interest in the matter under investigation.

22. In ***S. v. MSIBI* 1974 (4) SA 821 (T)** the Court expressed the following view on the matter of compliance with the regulations dealing with affidavits:

> "*The requirements as contained in regulations 1, 2, 3, and 4 of* Government Notice R.1258 *of 21 July 1972 and published in terms of section 10 (1) of the Justices of the Peace and*

Commissioners of Oath Act, 16 of 1963, are not peremptory but merely directory.

In a suitable case, where the requirements have not been complied with, the court may refuse to accept the affidavit concerned as such or to give any effect to it. The question should in each case be whether there has been a substantial compliance with the requirements."

23. Looking at this challenge holistically I am satisfied that there was an affidavit before the first Respondent when he considered the issue of a Warrant and that the shortcomings (if one could call them that) were hardly so significant or material that they called into question whether it could be said that the document was, for those reasons, not an affidavit. The signature of the deponent, Col Roelofse, appears after the section that provides for the questions relating to the oath as well as the actual oath while the signature of the Commissioner of Oaths appears together with his full names as well as details of his physical address, rendering it capable of readily identifying him and his physical location, if need be. That there is a reference to a 'she' instead of a 'he' as well as there being no indication whether he is a Commissioner of Oaths *ex officio* or by special appointment, can hardly be material in my view to the extent that it would have as its consequence the invalidation of what would otherwise be an affidavit. Such an approach would elevate formalism above substance in every respect and should not be countenanced.

24. When I have regard to the Regulations governing the administration of an oath or affirmation published under GN R1258 in GG 3619 of 21 July 1972, and as amended from time to time, then indeed there has been compliance with those regulations except in the relatively minor aspects described above. Even if I am wrong on that score then the Court has the power to condone what the Applicants have characterised as an irregularity. The affidavit of Mr Mabasa, the Commissioner of Oaths, sufficiently explains the circumstances under which the error with regard to the gender of the deponent arose, and to that extent and only if necessary, I would have condoned the failure to comply with the Regulations that relate to the administering of an oath or affirmation.

b) **The warrant was *ultra vires* in that it authorised IPID officials to execute the warrant; as well as the presence of civilians:**

25. The second challenge advanced in respect of the lawfulness of the warrant is that:

    a) The warrant, to the extent that it authorises IPID officials to be clothed with the power to search and seize, is unlawful as Section 20 read with Section 21 of the Act only allows the first Respondent, when considering an application under the Act, to provide authorisation to members of the police to search and seize. Contending that IPID officers are not members of the police, it was argued that the warrant was, to that extent, *ultra vires*;

b) That in authorising the presence of three persons who can best be described as civilians, Mr C R Oellerman and Mr C C Wissing from Bowman Gilfillan in an advisory capacity; as well a valuator, Mr van Graan, the first Respondent exceeded his powers in terms of the Act which does not provide for the presence of persons other than the police even in an advisory capacity, or for particular technical reasons by virtue of the expertise they bring.

26. On the first component of the challenge and while it is so that Sections 20 and 21 of the Act make reference to a police official, the provisions of Section 24(2) of the Independent Police Investigative Directorate Act 1 of 2011 ("the IPID Act") provides that an IPID investigator is cast in the same position as a police official for various purposes contemplated in the Criminal Procedure Act 51 of 1977.

27. Section 24(2) of the IPID Act provides as follows:

> "*(2) An investigator has the powers as provided for in the Criminal Procedure Act, 1977 (Act No. 51 of 1977), which are bestowed upon a peace officer or a police official, relating to-*
> *(a) the investigation of offences;*
> *(b) the ascertainment of bodily features of an accused person;*
> *(c) the entry and search of premises; (d) the seizure and disposal of articles;*
> *(e) arrests;*
> *(f) the execution of warrants; and*
> *(g) the attendance of an accused person in court.*"

28. That being the case I do not take the view that the first Respondent was acting *ultra vires* when he authorised the warrant to include in the list of persons to execute the warrant, various IPID investigators as the provisions of Section 24(2) of the IPID Act read with the Act renders this a permissible authority to bestow on IPID investigators as the first Respondent did.

29. On the second leg of the challenge it is important to distinguish the role that the warrant contemplates the outside or independent persons are to play. The warrant clearly provides authority for their presence but in a very limited capacity – Mr Oellerman and Mr Wissing in an advisory capacity to assist in identifying specific documentation as mentioned in the warrant; and Mr Van Graan as valuator. The list of authorised persons (Annexure A to the warrant) also includes their names in the same limited capacity. Finally the affidavit of Col Roelofse explains why the presence of the 3 persons is necessary – Mr Van Graan to value the home of Lt Gen. Phahlane in line with the approach that the value of his house far exceeds the financing he utilised, which in turn supports the allegation that he (Phahlane) received various amounts of money from service providers to assist in financing his private dwelling;

30. Insofar as Mr Oellerman and Mr Wissing are concerned, Col Roelofse explains that both are from the law firm Bowman Gilfillan who were tasked by Treasury to do an investigation into alleged irregularities in the awarding of tenders and contracts to service providers and their presence in an advisory capacity would assist in identifying the specific documentation mentioned in Annexure B of the warrant.

31. The Applicants relied on the *dicta* in ***SMIT & MARITZ ATTORNEYS AND ANOTHER v LOURENS NO*** **2002 (1) SACR 152 (W)** where the Court concluded as follows with reference to the validity of a search warrant addressed to "all police officers":

> *"The first applicant is a firm of attorneys practising from the same premises as the second applicant... "* (at page 154c)
>
> "*Both search warrants were addressed as follows: 'Aan alle polisie beamptes'*. (154c-d)

In this matter the second applicant was a registered accountant and auditor, while the first Respondent was the Magistrate. The Fourth Respondent was appointed by the Department of Development Local Government and Housing, North West Province to "...undertake a full scale forensic audit into allegations of irregularities and maladministration in respect of the Eastern District Council". The third Respondent was the investigating officer.

32. In respect of the legality of the search and seizure van Oosten J considered and concluded as follows at page 158:

> "*One of the grounds of objection raised was that the police officers were assisted in the execution of the search warrants by representatives of the fourth respondent who were not authorised in terms of the warrants either to be present at or involved in the execution thereof.*" (at page 158b-c)
>
> ....
>
> *"In terms of the search warrant the fourth respondent's representatives were not authorised either to be present during*

or to assist members of the South African Police Services in the execution of the warrants." (at 158c-d)

33. The Applicants also relied on the approach taken in ***EXTRA DIMENSION AND OTHERS v KRUGER NO AND OTHERS*** **2004 (2) SACR 493 (TPD).** With reference to s 21(2) of the Criminal Procedure Act, Motata J decided that:

> "*From the aforegoing it is clear that the magistrate can only authorise a police official to search*" (at 497b-c)

34. The Court also stated that:

> *"The first respondent's authorization of the warrant to private individuals to search and seize is clearly* ultra vires *the Criminal Procedure in the light of the aforementioned and the legality thereof is tainted."* (at 497h)

35. I fully concur with the approach taken in both of these matters but point out that they are distinguishable. In ***SMIT & MARITZ ATTORNEYS*** the warrant did not provide for the authorisation of the representatives of the Department of Housing and Local Government to either be present or to assist members of the SAPS in the execution of the warrant, while in ***EXTRA DIMENSION*** the Court was correctly and understandably concerned that the warrant authorised private individuals to search and seize, something Section 20 and 21 of the Act does not contemplate.

36. On the facts before me, the inclusion of the names of the private persons is well motivated and authorised, and then in a purely advisory capacity in respect of Messrs Oellerman and Mr Wissing; and in the case of Mr van Graan, as

valuator. Clearly if regard is had to the terms of the warrant then such persons are authorised to be present (which was not the case in ***SMIT & MARITZ ATTORNEYS***) and their role did not extend to being authorised to search and seize (which was what occurred in ***EXTRA DIMENSION***).

37. That being the case the question that still arises is whether it is permissible for outside persons to be authorised to be present at a search and seizure for the limited purpose of the expertise they bring. My view is that one must take a realistic approach to the issue while at the same time guarding against outsourcing the functions and powers of the SAPS or allowing private individuals or entities to usurp such powers. In an age where technology and expertise become increasingly specialised and significant bodies of knowledge and expertise are developed in dedicated areas, it is unrealistic to expect the investigative agencies of the State at any given time to possess all of the technical and other expertise that may from time to time be necessary to conduct a successful investigation. It may well happen that such expertise may reside outside of the State and under such circumstances I can think of no principled reason that offends the legal and constitutional order we live under that should permit such expertise to go unused with all the attendant negative consequences that go with it.

38. On the contrary, efficient and effective policing may require that such expertise as may exist be utilised both to assist in the effective investigation of crime as well as to fill knowledge gaps in particular instances. When so used in search and seizure operations, then there is clearly a greater need to specifically carve out and define the role to be played by such outside persons both in seeking the

authorisation for their presence as well as their role in the actual execution of the warrant.

39. All of this was done with great care in the affidavit of Col Roelofse and while already pointing out how this matter is clearly distinguishable from the approach taken in ***SMIT & MARITZ ATTORNEYS*** and ***EXTRA DIMENSION***, my view is that there is nothing in Section 20 or Section 21 of the Act that offends against the presence of private persons at a search and seizure provided they are properly authorised to be there and their role is clearly defined and does not relate to the actual execution of search and seizure activities.

40. Some of the considerations that should, in my view, be placed before the authorising Magistrate may include (but not be limited) to the following:

    a) Why is the presence of such persons, regard being had to the nature of the search and seizure to be conducted, necessary?
    b) Whether such persons bring special expertise or knowledge to the search and seizure operation, which knowledge and/or expertise may not ordinarily reside within SAPS personnel;
    c) The clearly defined role that such persons are required to play in the search and seizure operation;
    d) Under whose control and authority will such persons operate during the search and seizure operation?; and
    e) In what manner will the presence and assistance of such persons render the search more effective and compliant and possibly reduce

or limit the incursion into the privacy and other rights of those who are the subject of the search?

41. The consideration of these factors may go a long way in ensuring that a proper case is made out for the presence of such outside persons as well as to ensure that the authority that may ultimately granted for their presence is carefully tailored to ensure their role is limited and their presence there is properly supervised.

42. In the context of this application my view is that there has been a proper case made out for the presence of the 3 individuals either in an advisory capacity or as expert valuator, which does not offend the architecture of the Act or result in an intrusion into the rights of those affected than what would be ordinarily warranted had such persons not been included in the warrant.

43. I accordingly conclude on this aspect that the inclusion of the 3 outside persons on the warrant was not *ultra vires* the powers of the first Respondent and accordingly does not form a basis for the setting aside of the warrant as contended for by the Applicants.

c) <u>That the alleged offences investigated were not properly substantiated and that the warrant was breathtakingly wide:</u>

44. The Applicants' stance is that the information supplied by Col Roelofse in the affidavit presented to the first Respondent and which led to the issue of the

warrant was meagre and unsubstantiated. In this regard the Applicants sought to rely on a number of cases that supported the view that there should be reasonable grounds that the alleged offences were committed as well as reasonable grounds for believing that an article which is to be the subject of the search and seizure is believed to be concerned in the commission or suspected commission of the offence, or is intended to be used in the commission of an offence or may afford evidence in the commission or suspected commission of an offence.

45. In ***MINISTER FOR SAFETY AND SECURITY v VAN DER MERWE AND OTHERS*** **2011 (5) SA 61 (CC)** the Court stated the following:

> *"All law-abiding citizens of this country are deeply concerned about the scourge of crime. In order to address this problem effectively, every lawful means must be employed to enhance the capacity of the police to root out crime or at least reduce it significantly. Warrants issued in terms of section 21 of the CPA are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating, and investigating crime. In the course of employing this tool, they inevitably interfere with the equally important constitutional rights of individuals who are targeted by these warrants. Safeguards are therefore necessary to ameliorate the effect of this interference. This they do by limiting the extent to which rights are impaired. That limitation may in turn be achieved by specifying a procedure for the issuing of warrants and by reducing the potential for abuse in their execution. Safeguards also ensure that the*

power to issue and execute warrants is exercised within the confines of the authorising legislation and the Constitution. These safeguards are: first, the significance of vesting the authority to issue warrants in judicial officers; second, the jurisdictional requirements for issuing warrants; third, the ambit of the terms of the warrants; and fourth, the bases on which a court may set warrants aside. It is fitting to discuss the significance of the issuing authority first. Sections 20 and 21 of the CPA give authority to judicial officers to issue search and seizure warrants. The judicious exercise of this power by them enhances protection against unnecessary infringement. They possess qualities and skills essential for the proper exercise of this power, like independence and the ability to evaluate relevant information so as to make an informed decision. Secondly, the section requires that the decision to issue a warrant be made only if the affidavit in support of the application contains the following objective jurisdictional facts: (i) the existence of a reasonable suspicion that a crime has been committed and (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched. Both jurisdictional facts play a critical role in ensuring that the rights of a searched person are not lightly interfered with. When even one of them is missing that should spell doom to the application for a warrant. The third safeguard relates to the terms of a warrant. They should not be too general. To achieve this, the scope of the search must be defined with adequate particularity to avoid vagueness or overbreadth. The search and seizure operation must thus be confined to those premises and articles which have a bearing on the

offence under investigation. The last safeguard comprises the grounds on which an aggrieved searched person may rely in a court challenge to the validity of a warrant. The challenge could be based on vagueness, overbreadth or the absence of jurisdictional facts that are foundational to the issuing of a warrant."

46. The principles enunciated in ***VAN DER MERWE*** cases remain salutary but they must all be considered in the context of the facts of each case and it then becomes necessary to test the affidavit of Col Roelofse against the kind of particularity the Courts have alluded to. Col Roelofse mentions a number of offences that include fraud, corruption and money laundering. In his affidavit he sets out in some considerable detail the *modus operandi* of providing vehicles to the Phahlanes and other police officers, put into place by the first and third Applicants both in respect of the entities who supplied the vehicles, the entity who paid for it, and then the entity that received it. The role and involvement of those under investigation in this scheme of corruption is set out in some detail. The affidavit then goes on to deal with the investigation of tender irregularities which may include fraud and corruption and seeks to make the link between the supply of the motor vehicles and the irregular awarding of tenders and contracts.

47. These are not vague and unsubstantiated allegations that Col Roelofse alludes to, but allegations that are to some extent supported by documents and a money chain. Of course whether they constitute sufficient evidence to prove guilt in a criminal trial is not for this Court to determine and the standard in any event is

simply that there must exist reasonable grounds for holding the view that the offences under investigation have been committed.

48. For the reasons given I am of the view that such grounds clearly emerge from the affidavit of Col Roelofse and satisfied the jurisdictional requirement found in Section 20 of the Act that reasonable grounds must exist with regard to the commission or suspected commission of an offence.

49. A further and separate ground for the challenge to the warrant was that the scope and extent of the warrant issued by the first Respondent was described as being breathtakingly wide and in particular in relation to the documentation described therein and which includes the following:

1. *Company Registration documents in respect of:*
    - *Prima Inspectacar Wonderboom with registration number 2005/009567/07*
    - *Prima Inspectacar trading as Hyundai Mokopane with registration number 1999/015215/07*
    - *Ronat Nissan Mosselbay with registration number 2001/028018/07*
    - *Forensic Data Analyst (Pty) Ltd with registration number 1999/023867/07*
2. *Audited financial statements and / or files and / or annual financial statements and notes of said companies*
3. *All documentation and / or financial records relevant to any loan accounts*
4. *Bank statements and bank correspondence relating to both local accounts as well as accounts held in another country*

5. *Documents pertaining to local inter account transfers, including but not limited to documents showing Electronic Funds Transfers (EFT's)*
6. *Documents relating to international electronic wire transfers including but not limited to instructions to the bank to affect such transfers*
7. *All documents relating to Trusts in the name of the person/s and/or entities as mentioned above*
8. *Personal Diaries and Business Diaries of Keith Keating, FDA executives and personal assistants of such Executives, Durand Snyman, Desire Smith, JK Phahlane (Lieutenant General), BN Phahlaner (Brigadier), JJ Potgieter (Colonel)*
9. *All tender/contract files containing information relating to the following:*
    - *contract 19/1/9/1/141TD (13) – cancelled*
    - *contract 19/1/9/1/172TD (13) – cancelled*
    - *contract 19/1/9/1/228TD (13) – cancelled*
    - *contract 19/1/9/1/235TD (14) – February/March 2015*
    - *contract 19/1/9/1/236TD (14) - February/March 2015*
10. *The tender/contract file need to include inter alia but not limited to all bid application documents, quotations, all import/export documents, order forms, delivery notes, comprehensive list of goods provided, deviation application, maintenance contracts, guarantees provided by original supplier, cost per item as supplied by original supplier, maintenance contracts as supplied by the original supplier, any agreement between FDA and the original supplier awarding FDA the rights as a sole supplier of said goods within South Africa if any*
11. *All tender/contract documents relevant to the ROFIN, Spherin and Nikon contracts as per* ***document number SUB 03/FDA****, including but not limited to extensions, proposals between FDA, SAPS and SITA*

12. *Receipt books, Deposit slips, Returned cheques, Cheque book stubs, Order books, Supplier invoices, Supplier statements, Delivery notes, Invoice books, Debtor statements, Sale lists, Cash book, Creditor ledger, General ledger, Trial balances, Management accounts, Journals, balance sheets, Income statements*
13. *Personal financial records relating to Keith Keating, Durand Snyman, Desire Smith, JK Phahlane (Lieutenant General), BN Phahlane (Brigadier), JJ Potgieter (Colonel). These would include:*
    - *All personal and business bank accounts*
    - *Details on local investments*
    - *Details on foreign investments*
    - *Foreign bank account statements and information*
    - *Share certificates and/or related documentation*
    - *Trust accounts and/or related documentation*
    - *Vehicle finance and/or ownership information*
    - *Loan agreements*
    - *Commercial and personal contractual documentation*
    - *Details of assets and liabilities*
    - *Company, Close Corporation incorporation documentation*
    - *Commercial and private transaction records related to any SITA and/or SAPS officials*
14. *Any electronic cards used for financial transactions which would include inter alia cards, debit cards in the possession of JJ Potgieter of which he is not the account holder*
15. *Any and all documentation relating to the building/upgrading of the Phahlane residence at 10 Mongoose Avenue, Sable Hills Waterfront Estate, Kameeldrif, Pretoria (Erf 53), including but not limited to supplier invoices, sub-contractor contracts, bond statements*

16. *Itemised billing to cell phones and / or any electronic correspondence (SMS messages, emails send from and received on the particular cell phone, fax messages send from and received on the particular cell phone, etc.). The cell phone / electronic communication device will have to be confiscated to enable downloading of such information.*
17. *All other information relating to the cell phone or electronic communication device which may identify the unique serial number of such phone or device and which may identify the owner thereof*
18. *All computer hardware and software and all optical and magnetic storage devices which are used to generate and / or store and / or produce information and / or documents*
19. *Cellular contracts between the various suspects which would include applications such as inter alia Whatsapp, Facebook.*

50. While this is no doubt an extensive list the question as to whether it is overly wide must be considered in relation to the alleged offences under investigation as well as the *modus operandi* allegedly used. Here, Col Roelofse has stated that the supply of vehicles and the provision of funds by civilian entities to Lt Gen. Phahlane and other police officials was linked to the irregular awarding of tenders. Thus, the alleged corrupt scheme that he sets out would require investigation of a considerably wide remit that just did not include the question of the motor vehicles which are dealt with in some detail, but also contracts, awards, tenders, company documents and all of the matters covered in the warrant. While they are no doubt wide, that in itself does not render them unacceptably wide and I am unable to conclude that even on the face of it, any category of document set out therein could be regarded as being irrelevant.

51. I am satisfied that regard being had to the nature of the investigation, reasonable grounds existed to believe that the articles in question and specified in the warrant may have afforded evidence of the commission of the offences under investigation. It is worth recalling the caution in ***CINE FILMS (PTY.) LTD. AND OTHERS v COMMISSIONER OF POLICE AND OTHERS*** **1971 (4) SA 574 (W)** to the following effect:

> *"In fact a purpose of a search warrant is to aid in the detection of crime and to bring it home to the wrongdoer. Hence the fact that the Attorney-General has not got sufficient evidence to justify the institution of a prosecution does not mean that a Magistrate or a police officer has not got reasonable grounds for believing that articles, which will afford evidence as to the commission of an offence or which were used for the purpose of the commission of such offence, will be found pursuant to the issue of a search warrant. In this regard it is not relevant to state that it was held in* Andresen v. Minister of Justice, *1954 (2) SA 473 at page 480, that "evidence" in this section is used in a colloquial sense and is not restricted to legal evidence admissible in a Court of law."*

52. Also in ***THINT (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS; ZUMA AND ANOTHER v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS*** **2008 (2) SACR 421 (CC)** the Constitutional Court dealt with the reasonability of requiring an investigator to specify in advance every possible class of item relevant to the investigation to be specified in the warrant (at paragraph 175 and 176 at 493i and 494a-c):

> *"The 'catch-all' paragraphs, unlike the other paragraphs in annexure 'A' to the warrants, did not refer to a particular class*

of documents; instead, they covered any document, of whatever nature or content, that either had, or might have had, a bearing on the investigation. This did not render these paragraphs unduly vague or overbroad. There may well have been documentation with a bearing on the investigation that did not fall into a category covered by any of the other paragraphs, and it was unreasonable to expect the investigators to specify in advance every possible class of item relevant to the investigation that might be found during a search."

53. The Applicants also take issue with the scope of the kind of articles the warrant authorises the search and seizure of, and argue that beyond it being overly wide, no basis is laid for the inclusion of such a wide array of articles in relation to the person mentioned in the warrant as there is no connection established between such documents and their relevance on the one hand, and the persons who are listed in that part of the warrant.

54. I am not convinced that such an approach that seeks to rigidly compartmentalise what is being investigated and against whom, is appropriate. While Annexure B of the warrant may appear to be composed of two parts – the one relating to the vehicles, and the other to the more general allegations of corruption and tender fraud, they are inextricably linked if one has regard to the affidavit of Col Roelofse as a whole and it would be simplistic to see and consider them as separate components of the investigation. That being the case, it is logical and practical to expect the investigation to canvass the broad range of documents and articles that the warrant contemplates and in respect of the persons mentioned, especially if regard is had to the stance of Col Roelofse that money and vehicles had changed hands. The mention of financial records,

company documents, diaries, bank accounts, tender documents, personal financial records, and suchlike articles assume a relevance that is quite obvious.

55. Finally it was argued from the perspective of the fifth Applicant that no basis existed for the issue of the warrant in respect the premises at 10 Naval Escort Street, Mooikloof or in respect of the person "C de Bruin with identity number 9602120102086". In particular, the fifth Applicant contends that there is no allegation of him being a suspect in any investigation and further that the identity number provided is that of his daughter who is a student residing in Potchefstroom. He does however admit that he acquired a vehicle from Mr Snyman in exchange for game, which vehicle was then registered in the name of his daughter.

56. Col Roelfose in his affidavit lists the vehicle in question as one of those delivered by Prima InspectaCar and for which he says he believes the first Applicant paid Mr Snyman and that this vehicle was one of those where the name John Doe was used in the records of Prima InspectaCar in order to hide the names of the future owners. In the overall scheme that Col Roelofse explains, this vehicle that the fifth Applicant admits he received, appears to have been dealt with by Mr Snyman and Mr Keating in the same fashion as the other vehicle and I do not think it is unreasonable for Col Roelofse to have included this as part of the investigation. In fact, that he did not regard the fifth Applicant or his daughter as a suspect, and that their names were not listed as such, suggests a careful approach taken by Col Roelofse. There were certainly reasonable grounds to consider the article (the vehicle) as providing some evidence of the commission of an offence that was being investigated.

57. The issues that I have dealt with above all deal with the stance of the Applicants that the first Respondent should not have issued the warrant, as either the jurisdictional facts that were required were not present, and that the scope and extent of the warrant was impermissibly wide. In addition the Applicants contend that the warrant and the results of the search stand to be set aside also on the basis of the manner in which the warrant was executed and raise a number of complaints:

a) **The unauthorised presence of a Mr De Villiers of the firm Bowman Gilfillan during a part of the search and seizure operations:**

58. It is common cause that a Mr de Villiers, a partner at Bowman Gilfillan, played a limited part in the search and seizure operation on the 4th of December 2017. While the third to the fifth Respondents concede that his presence there was not authorised and therefore irregular, they point out that the irregularity was not of the kind that should lead to the setting aside of the warrant.

59. In an affidavit filed by him, Mr De Villiers says he is a partner in the firm of Bowman Gilfillan and that he was the team leader of the Treasury Investigation into the second Applicant and that Mr Wissing and Mr Oellerman were part of his team and that he was aware that their names were included in the warrant issued on the 1st of December 2017. He states that on the 2nd of December 2017, Mr Wissing informed him that Mr Oelllerman was due to be in Cape Town on the 4th of December 2017 and would be unable to be part of the team and suggested that he, de Villiers, replace Oellerman. He agreed and joined the

team on the 4th of December 2017, was asked to consider the relevance of three to four files handed to him by SAPS officials and took the view that none of the documents he was asked to consider were relevant. He says he spent about 30 minutes in the premises before he was asked to leave which he did. Finally, he states that his presence there was purely as a result of the unavailability of Mr Oellerman, whose name was reflected on the warrant.

60. While there is no doubt that the presence of Mr De Villiers was not authorised on the warrant, I am not convinced that it is the kind of irregularity that should result in the setting aside of the warrant. He was the team leader at Bowman Gilfillan; he explains why he stepped in to fill the gap left by the absence of of Mr Ollerleman; and then finally spent a very limited time in the operation, all of which was to advise that the documents he was asked to consider were not relevant. In this regard it could not be said that the presence of Mr De Villiers constituted an abuse of the power given in the warrant or a gross violation of the rights of the Applicants. It was irregular but a reasonable explanation has been advanced as to how it came about, and the precise role Mr de Villiers played in the process. To invalidate the warrant on that basis alone would in my view be yielding to an objection that is largely technical in nature.

61. Another basis for the setting aside of the warrant relates to the allegations by the Applicants that Mr Wissing, who was only authorised to be present in an advisory capacity, was actively involved in the search and seizure. Mr Wissing denies this and explains his role as follows:

"*4.1 I deny the allegation made in Mr du Toit's affidavit that I was actively involved in the search and seizure and that I was not acting in an advisory capacity.*

...

4.3 The assistance I provided was as follows:

4.3.1 A member of the SAPS would take possession of a document or file from an office of one of the second respondent's employees;

4.3.2 If that SAPS member was unsure about the document of file's relevance to an investigation, he/she would request me to provide my opinion;

4.3.3 I would provide that SAPS member with my opinion. The ultimate decision on whether the document should be seized rested with the relevant SAPS member."

62. Given that these are motion proceedings and regard being had to the rule in ***PLASCON-EVANS PAINTS (TVL) LTD. v VAN RIEBECK PAINTS (PTY) LTD.*** **[1984] 2 All SA 366 (A)** the issue falls to be determined on the version of the Respondents (unless that version is so far-fetched that it warrants rejection out of hand, which is not the case here), and accordingly the final relief sought by the Applicants is simply not competent.

63. Finally it is the submission of the Applicants that a number of documents seized were not relevant and fell outside the scope of the warrant, suggesting that the warrant was so wide that it went beyond what was legally permissible and that in addition, the officials who were tasked with executing the warrant, did not know the scope of what was permissible, resulting in them including the unlawful request for outside individuals to be present. I have already dealt with the presence of the outside persons while the point in respect of irrelevant

documents being seized cannot on its own invalidate the search. The Respondents have indicated that whatever was taken that is not relevant, has been and/or will be returned.

64. It must be appreciated that in a search as extensive as this one was, and covering a wide array of documents, there will always be the risk that irrelevant documents will be taken or perhaps even documents that strictly fall outside the scope of the warrant. Provided that it does not constitute an abuse of power or an unwarranted interference in the rights of others, my view is that the offer to return the documents would be the most appropriate manner of resolving that issue. I am not satisfied that it constitutes a basis for the setting aside of the warrant or indeed for an order that the results of the search be excluded from evidence in any possible future trial.

65. For all those reasons I am not satisfied that the Applicants have made out a case for the relief they seek and that the application falls to be dismissed.

Costs

66. There is no reason to depart from the practise that generally, costs should follow the result and I intend to make such an order. The matter of the costs reserved on the 10th of January 2018 arose and the Applicants were of the view that whatever the outcome of the main application, those costs of the 10th of January 2018 which were reserved, should be paid by the Respondents. The stance of the Respondents was that those costs should follow the result of this application.

67. I have not been furnished with sufficient reasons as to why the reserved costs of the 10th of January 2018 should be dealt with on a different basis, and why in particular the Respondents should be liable for those costs. That being the case, the costs occasioned on the 10th of January 2018 should follow the result in this application.

Order

68. I make the following order

- The application is dismissed with costs including the costs of two counsel and which costs are to include the costs reserved on the 10th of January 2018.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

86233/2017

HEARD ON: 18 June 2018

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FOR THE RESPONDENTS: Advocate B Roux SC & Advocate W Botha
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